Supreme Court, U.S.
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No. 06-615

In The

Supreme Court of the United States

MARJEAN SEARCY,

Petitioner,

v.

3 DAY BLINDS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented is, when the employee has established a prima facie case of age discrimination, and the company asserted that the employee was terminated because of a single negative comment about company practices, whether that comment alone was a sufficient, legitimate, non-discriminatory reason for her discharge such that the entry of summary judgment in favor of the Respondent was proper.

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FEDERAL STATUTES

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The Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. § 623 *et seq.* 2

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* 2

ARIZONA STATE STATUTES

Arizona Revised Statutes § 43-1463(B)(1) 2

OPINION BELOW

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit was not published. The decision of the United States District Court of the District of Arizona was not published. Copies of the decisions are attached to the Appendix.

BASIS FOR JURISDICTION OF UNITED STATES SUPREME COURT

A. Stage of Proceedings When the Federal Questions Sought to be Reviewed Were Raised.

The issue to be reviewed was presented to both the District Court of Arizona and the Ninth Circuit Court of Appeals.

B. The Date of Any Order Respecting Rehearing.

The Petitioner did not file an application for rehearing.

C. The Statutory Provision Believed to Confer Jurisdiction on This Court to Review on Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

1. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

2. The Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. § 623 *et seq.*

3. The incorporated provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

4. The age discrimination provisions of Arizona Revised Statutes § 43-1463(B)(1). See Appendix.

STATEMENT OF THE CASE AND FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

1. Statement of the Case

Ms. Searcy filed a civil action for age and sex discrimination under 42 U.S.C. § 2000e *et seq.*, and Arizona Revised Statutes § 43-1463(B)(1) seeking, *inter alia*, compensation for lost wages and benefits. The matter was originally filed in the District Court of Arizona on January 14, 2003, case number CIV03-0090 PHX-MS, asserting that the District Court had original jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, and under the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.*

3 Day filed a motion for summary judgment on June 14, 2004 to which Ms. Searcy filed her Response on July 7, 2004. On July 28, 2004 the District Court entered an order

granting 3 Day's motion for summary judgment on all of Ms. Searcy's claims. The final judgment in favor of 3 Day was entered on the same date. Ms. Searcy's Notice of Appeal was timely filed August 23, 2004, under Rule 4(a), Federal Rules of Appellate Procedure. On August 7, 2006, the Memorandum Decision of the Ninth Circuit Court of Appeals was filed.

2. Stage in Proceedings When the Federal Question Was Sought to Be Reviewed Were Raised

A. Manner in which Federal Question Was Raised.

The issue was raised in Ms. Searcy's response to 3 Day's motion for summary judgment and also in her Opening and Reply Briefs to the Ninth Circuit Court of Appeals.

B. Manner in which the Courts Passed on the Federal Question.

The Arizona Court of Appeals passed on the Federal Question in its Memorandum Decision of August 7, 2006, by ruling that 3 Day's evidence that Ms. Searcy had a negative attitude was uncontradicted and, therefore, a legitimate, non-discriminatory reason for discharging her.

C. Specific Portions of Record Where Matter Appears.

The matter appears on pages 6 through 22 of Ms. Searcy's Opening Brief and on pages 1 through 11 of Ms. Searcy's Brief.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The fundamental reason that the Appellant relies upon the allowance of this writ is that the Ninth Circuit Court of Appeals has effectively rendered a nullity the federal statutes prohibiting age and sex discrimination through wrongly applying substantive procedural barriers, i.e., "pretext or mixed motive theories." Thus, in order to prevail, Ms. Searcy must demonstrate that the alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory. *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 889 (9th Cir. 1994). Also, circumstantial evidence of pretext must be specific and substantial in order to survive summary judgment. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998). Therefore, the trial courts consistently grant summary judgment motions gutting an employee's federal rights by wrongfully applying the "doctrine of pretext or mixed motive." The unfair result is that discriminated employees such as Ms. Searcy, who was wrongfully terminated because of her age and sex, are precluded from having their day in court. This is grossly unfair, based upon federal law, which strikes out at wrongful termination. Thus, the trial courts routinely and almost automatically grant summary judgment despite the United States Supreme Court's position that the question of an employer's intent to discriminate is "a pure question of fact." *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789-90 (1982).

REASONS FOR GRANTING THE WRIT

The decision in this case makes it crystal clear that the trial courts no longer desire to consider claims of age discrimination of an employee and, therefore, peremptorily dispose of such cases through summary procedures. The employee is wrongfully precluded from having his or her day in court. To reach this grossly unfair result, all the employer has to do is articulate the most "de minimis, insignificant and ethereal reason" for the employee's discharge, and the trial court wrongfully applies the "pretext doctrine" to grant the employer's motion. This application of the "pretext doctrine" is fundamentally wrong and is regularly being misapplied by federal trial judges. This Court should address this unjust practice by the federal trial courts.

Respectfully submitted: October 31, 2006.

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APPENDIX

1. Memorandum Decision of the Ninth Circuit Court of Appeals ..... App. 1
2. Ruling of the District Court of Arizona granting summary judgment ..... App. 4
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2006 WL 2255498

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MARJEAN SEARCY, Plaintiff-Appellant, v. 3 DAY BLINDS INC, Defendant-Appellee.	No. 04-16673 D.C. No. CV-03-00090-FJM MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Submitted July 28, 2006**
San Francisco, California

Before MERRITT,*** KLEINFELD, and PAEZ, Circuit Judges.

Filed Aug. 7, 2006.

As 3 Day concedes, Searcy established a *prima facie* case of discrimination because she was an over-40 female, was performing her job adequately, and was replaced by a

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Gilbert S. Merritt, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

younger male. The burden of production having shifted to 3 Day,[1] the company offered legitimate, non-discriminatory reasons for discharging her; the company was consolidating two stores, needed only one manager, and chose the one with the better attitude. "If the defendant articulates such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive."[2] To avoid summary judgment, the plaintiff must produce "'specific, substantial evidence of pretext.'"[3]

Searcy had no evidence for the pretext beyond her *prima facie* case and speculation. The employer presented uncontradicted evidence that Searcy had expressed a negative attitude about company practices and that the manager with whom she was competing for the single spot was seen by the company as having a positive attitude.

Searcy also appeals the district court's denial of her motion for leave to amend her complaint. Searcy was subject to a Rule 16 scheduling order and filed her motion outside of the time provided by the order. Plaintiffs wishing to amend their complaints outside of the time line established in a Rule 16 order must "show good cause for failing to amend their complaints earlier."[4] Searcy offered no "good cause." She argues that her request did not prejudice 3 Day, but lack of prejudice does not constitute

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[1] *See Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001).

[2] *Id.*

[3] *Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995).

[4] *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).

good cause.[5] In any event, the district court found prejudice to 3 Day, and we cannot say that its ruling was an abuse of discretion.

AFFIRMED.

[5] *See id.* at 1295 (Explaining that prejudice, "although not required under Rule 16(b), supplies an additional reason for denying the motion.").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARJEAN L. SEARCY, Plaintiff, vs. 3 DAY BLINDS INC., Defendant.	No. 03-CV-00090-PHX-FJM **ORDER** (Filed Jul. 28, 2004)

Before the court are Defendant's motion for summary judgment (doc. 31), Plaintiff's response, and Defendant's reply.

Defendant ("3 Day") had two stores in Glendale. Searcy managed one ("the Arrowhead store"), and a non-party ("Burkett") managed the other. 3 Day closed Burkett's store and made Burkett manager of the Arrowhead store. In addition, Searcy's supervisor ("Hauser") fired Searcy. Searcy filed this action claiming sex discrimination in violation of Title VII and A.R.S. § 41-1463(B)(1), and age discrimination in violation of the Age Discrimination in Employment Act.

3 Day moves for summary judgment. The parties agree that we use the familiar burden-shifting analysis to determine whether summary judgment is appropriate. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Nesbit v. PepsiCo, Inc.*, 994 F.2d 703 (9th Cir. 1993.). They also agree that the same analysis is dispositive of the state law claim. For purposes of this motion, 3 Day assumes that Searcy has made a prima facie case of age and sex discrimination. 3 Day must provide a legitimate business

reason for terminating Searcy. Searcy must then provide evidence that the reason is pre-textual.

3 Day asserts that it fired Searcy because it was consolidating the two stores and Hauser thought Burkett would be a better manager. Hauser thought Searcy had a bad attitude and complained about store policies. Hauser thought Searcy was unhappy in her job. Defendants' SOF 8-14. In her deposition, Searcy stated that she felt discouraged at her job and expressed disagreement with company policies. Defendants' SOF, Ex. 2 at 49, 52-55. We conclude that 3 Day has shown evidence of a legitimate business reason for terminating Searcy.

Searcy contends that this reason is pre-textual. She argues that she was qualified for her position, that she received good reviews from a prior supervisor, and that a younger man, Burkett, replaced her. Plaintiff's response at 7, Plaintiff's SOF 1-4. But this evidence does not more than restate her prima facie claim.

Searcy also argues that Hauser did not mention Searcy's unhappiness when terminating her. Plaintiff's response at 7. But, in her deposition Searcy was asked what Hauser said when she terminated Searcy. Searcy replied "She terminated me, and I says 'Why?' and she says, 'Well, you're not happy here anyway.'" Defendant's SOF, Ex. 2 at 129. Finally, in her deposition, Searcy stated that her only evidence of discrimination was her opinion. Dependant's SOF, Ex. 2 at 41-44, 121-22. We conclude that Searcy has failed to offer evidence of pretext.

Because 3 Day offered evidence of a legitimate reason for terminating Searcy, and Searcy failed to offer evidence of pretext, we GRANT 3 Day's motion for summary judgment.

Accordingly,

IT IS ORDERED GRANTING Defendant's motion for summary judgment (doc. 31).

DATED this 27 day of July, 2004.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARJEAN L. SEARCY, Plaintiff, vs. 3 DAY BLINDS INC., Defendant.	CIV-03-090-PHX-FJM **JUDGMENT** (Filed Jul. 28, 2004)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court having granting Defendant's Motion for Summary Judgment [36], Plaintiff take nothing. This Complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 28th day of July, 2004.

RICHARD H. WEARE
DCE/Clerk of Court

/s/ L. Blankenship
Deputy Clerk